

## REPORTER'S RECORD

VOLUME 3 OF 21 VOLUME(S)

TRIAL COURT CAUSE NO. 1376988P

COURT OF APPEALS CASE NO. 02-14-00412-CR

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2nd COURT OF APPEALS  
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DEBRA SPISAK  
Clerk

THE STATE OF TEXAS

) IN THE 372ND JUDICIAL

)

)

)

)

VS.

) DISTRICT COURT

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)

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)

THOMAS OLIVAS

) TARRANT COUNTY, TEXAS

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## PRETRIAL HEARING CONTINUES

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On the 30th day of January, 2014, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Scott Wisch, Presiding Judge, held in Fort Worth, Tarrant County, Texas;

Proceedings reported by computerized machine shorthand with assisted realtime transcription.

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Official Court Reporter  
372nd Judicial District Court  
Tarrant County, Texas

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## CHRONOLOGICAL INDEX

Volume 3 of 21

## PRETRIAL HEARING CONTINUES

	Page	Vol.
January 30, 2014		
The Court Calls Case for Trial.....	4	3
Defense First Amended Motion to Suppress Evidence.....	4	3
Defendant's Closing Argument by Mr. Moore.....	6	3
State's Closing Argument by Ms. Burks.....	14	3
Court's Ruling.....	21	3
Other Defense Motions and Rulings.....	31	3
Pretrial Hearing Concluded.....	45	3
Court Reporter's Certificate.....	46	3

## P R O C E E D I N G S

Thursday, January 30, 2014 10:00 a.m.

(OPEN COURT, DEFENDANT PRESENT)

THE COURT: We're going to continue with pretrial hearings on the State of Texas versus Thomas Olivas, 1352014R, as in Romeo, the reindictment of 1298688D, for purposes of this next-day hearing. There are motions, notices, legal documents filed on behalf of both parties in both cause numbers. The "R" case number is the one that will be tried, but both records will be maintained for purposes of litigation and, if necessary, any subsequent appeal.

Are both sides ready to resume, State?

MR. ROUSSEAU: Yes, Your Honor.

THE COURT: Defense?

MR. MOORE: We're ready.

THE COURT: All right. The next motion I've been asked to address is Defense First Amended Motion to Suppress Evidence, file-marked January 29th, which is basically a motion to quash two separate batches of data, to speak loosely, one relating to cell phone number records and one related, loosely speaking, to tower location records, and there are two different orders signed by two different judges. And I've been advised that the motion speaks for itself, this is a

1 question of law and it only needs to be argued, but  
2 there are no facts or evidence to be offered other than  
3 for the Court to take judicial notice of the contents of  
4 the Defense motion that these are the orders that were  
5 in the case and we want to quash any records obtained as  
6 a result of either or both orders.

7 Is that accurate?

8 MR. MOORE: That's accurate, Judge.

9 THE COURT: And does the State concede and  
10 agree for the Court to take notice that the application  
11 and orders, one signed by Judge Westfall and one signed  
12 by Judge Gallagher, that are attached to the Defense  
13 motion are the orders in issue in this cause?

14 MR. ROUSSEAU: Your Honor, I believe so, but  
15 I'm going to let Ms. Burks speak for me on this topic.  
16 She's a lot more well-versed on the topic than I am, so  
17 she's going to take over from this point in this  
18 hearing.

19 THE COURT: All I was asking you, as lead  
20 counsel and the person who's trying the case, to not put  
21 Ms. Burks in a position, and I'm sure she knows, but  
22 there are two orders that are attached to seek records.

23 MR. ROUSSEAU: Yes.

24 THE COURT: And you agree the orders  
25 attached to the Defense motions are the orders that

1 they're trying to have the evidence suppressed, they  
2 don't have to a file an exhibit with the court reporter.

3 MR. ROUSSEAU: Yes, that's fine, Judge.

4 THE COURT: Yeah, that's all I wanted to  
5 check with you, Kevin.

6 All right. And with that, since it's just  
7 argument...

8 Off the record.

9 (Discussion off the record)

10 DEFENDANT'S CLOSING ARGUMENT

11 MR. MOORE: Just to clarify the record, I  
12 actually, to obtain these orders that are attached to  
13 the first amended motion to suppress, had Judge  
14 Gallagher, who signed one of the orders, and Judge  
15 Westfall, who signed the other, actually signed a motion  
16 to unseal them. These were both sealed and in the  
17 District Clerk's possession, so I had them sign the  
18 motion and order to unseal them and that's how they came  
19 into being, or came to be attached to this.

20 And, basically, what we're talking about is  
21 cell tower locations, cell phone records, not  
22 necessarily content of cell phone records, such as text  
23 messages and voice messages, things of that nature, but  
24 the cell tower location. When you make a phone call or  
25 you text with your cell phone, which every one of us in

1     this room have nowadays, there's a tower that tells an  
2     area that you're in and it can trace you from location  
3     to location.

4                     And what happened in this particular case is  
5     the District Attorney's Office, through Assistant  
6     District Attorney Tracey Kapsidelis, prepared an  
7     application pursuant to 18 U.S.C. Section 27.03 and  
8     18.21 of the Code of Criminal Procedure.

9                     THE COURT: That probably would be Section  
10    5?

11                    MR. MOORE: I'm sorry?

12                    THE COURT: Would that be Section 5?

13                    MR. MOORE: Section 5.

14                    THE COURT: Request For Stored Information?

15                    MR. MOORE: Correct.

16                    THE COURT: All right. Go ahead.

17                    MR. MOORE: Correct.

18                    And instead of getting a search warrant,  
19     they obtained these records pursuant to this order on  
20     two different occasions.

21                    Our argument, Judge, is that we certainly --  
22     and I know some courts have held otherwise, but --

23                    THE COURT: Courts like where?

24                    MR. MOORE: Like the Fifth Circuit.

25                    THE COURT: Okay. Thank you for your

1 candor.

2 MR. MOORE: The Fifth Circuit has held  
3 basically that cell tower locations, people do not have  
4 an expectation of privacy when they are making telephone  
5 calls out there being traced with these cell phone  
6 towers and, therefore, law enforcement does not need to  
7 get a search warrant based on probable cause.

8 Our argument is just the opposite, that --  
9 and certainly this Court can look to the law of other  
10 jurisdictions in deciding this issue. I've brought you  
11 a case, and I've provided them a case, from the New  
12 Jersey Supreme Court, a recent case, cited the State  
13 versus Thomas W. Earls -- I'll give you a copy -- in  
14 which the New Jersey Supreme Court held that there is an  
15 expectation of privacy in the cell tower locations, and  
16 it lists -- and I won't go over all the reasons. You  
17 can read that case. It's a very well-reasoned opinion  
18 and points out why in our everyday world now, in our  
19 electronically controlled world, why people should have  
20 an expectation of privacy in their whereabouts.

21 THE COURT: And just to make a legal point,  
22 from reading the summary, they take the position that  
23 the New Jersey Constitution provides more protection  
24 than the Fourth Amendment.

25 MR. MOORE: And that's exactly right. And



1     our argument is that the Texas Constitution, Article 1,  
2     Section 9, provides more protection, going back to  
3     Heitman versus State, than the United States  
4     Constitution. And when you look at the Heitman  
5     decision -- and there's actually a case of Damon Jerome  
6     Richardson versus State, 865 S.W.2d 944, Court of  
7     Criminal Appeals decision. They address the issue of a  
8     PIN register, of getting telephone numbers that are  
9     dialed, and indicated the people have an expectation of  
10    privacy in those. And I would kind of compare that to  
11    your cell phone tower locations.

12           THE COURT: Well, and let me just say this.  
13    As I understand a PIN register, it's we want to start  
14    recording who they call, not ask for the records of who  
15    they've already called. The PIN register is to place  
16    something to monitor future conduct, not --

17           MR. MOORE: That's correct.

18           THE COURT: -- see what else that they had  
19    done and possibly bill for it on an itemized bill that  
20    says you called all these places. That's already in  
21    possession of the vendor who provides the phone service.

22           MR. MOORE: And you're right and -- but I  
23    think the real comparison is this. The Fifth Circuit  
24    has found that these are mere business records, that  
25    there is no expectation of privacy. They're business

1 records because they're just gathering records for  
2 billing purposes and that sort of thing, but when you  
3 consider...

4 THE COURT: Hold on. Hold on. Based on  
5 that last thing you said, are you still urging both  
6 parts of your motion, as to the who's-been-called  
7 numbers, records and the location records, or are you  
8 only challenging the location records?

9 MR. MOORE: Both.

10 THE COURT: Okay.

11 MR. MOORE: Both.

12 THE COURT: You're just understanding the  
13 logic on the billing records versus the tower records.

14 MR. MOORE: Well, I mean, they're both  
15 really for billing purposes, or for analysis, that's  
16 what they're for.

17 THE COURT: And, I guess from my position,  
18 one of the things, the way I've scanned through these  
19 orders, is here's the phone number and we want all the  
20 numbers they've called, we want a list of who they  
21 dialed and who dialed them. Are there any text messages  
22 that were seized as part of this or is it just phone  
23 numbers?

24 MR. MOORE: Just phone.

25 THE COURT: Okay. So that's the same type

1 thing that might be on a typical cell phone bill, if you  
2 have an itemized bill. What tower you call from, all  
3 that information, that is not on a typical cell --

4 MR. MOORE: I'm sorry?

5 THE COURT: Where you called from, what  
6 tower you bounced your signal off of or how many towers,  
7 your location was not part of a typical cell phone bill  
8 or business record, even though it's electronically  
9 maintained based upon the operation of how cell phones  
10 work.

11 MR. MOORE: You're right.

12 THE COURT: So but you're challenging both  
13 under the state constitution. Because it sounded like  
14 you almost conceded the phone bill part versus the  
15 location part, but you did not so --

16 MR. MOORE: No, no.

17 THE COURT: Okay. All right. That's fine.  
18 Still carried as to both issues.

19 You may continue.

20 MR. MOORE: Okay. Where were we?

21 THE COURT: You were talking about towers  
22 and phone bills and --

23 MR. MOORE: Well, I just think the bottom  
24 line is, Judge, that people have an expectation of  
25 privacy in where they are. You know, where you go after

1 work, where you visit, what church you visit, what  
2 establishments you visit, you have an expectation of  
3 privacy in that, and, therefore, if you have an  
4 expectation of privacy, Article 1, Section 9 of the  
5 Texas Constitution requires that a search warrant be  
6 obtained to gather this information, and then basically  
7 we're asking you to recognize that.

8           There's another part of our -- second part  
9 of the motion that I've addressed, the sufficiency of  
10 the application that Assistant DA Kapsidelis prepared  
11 and presented to Judge Gallagher and Judge Westfall. If  
12 you look at -- at 18 U.S.C. 27.03(d), it provides that  
13 "a court order for disclosure under (b) or (c) may be  
14 issued by any court that is a court of competent  
15 jurisdiction and shall issue only if the governmental  
16 entity offers specific and articulable facts showing  
17 that there are reasonable grounds to believe that the  
18 contents of a wire or electric communication, or the  
19 records or other information sought, are relevant and  
20 material to an ongoing criminal investigation."

21           And our position is that those -- if you  
22 read those applications attached, Exhibit C and Exhibit  
23 A, that they failed -- kind of a comparison to an arrest  
24 warrant or a search warrant affidavit, that they failed  
25 to establish any facts that show that they would be

1 relevant and material to an ongoing criminal  
2 investigation. And, therefore, we'd ask you to suppress  
3 those cell phone records that were obtained and not  
4 allow the State to use them in trial.

5 THE COURT: All right. I understand your  
6 factual and your legal position. Give me just a second.

7 (Pause in proceedings)

8 THE COURT: On the record.

9 I have reviewed the New Jersey Supreme Court  
10 case, its rationale and, quite frankly, a very succinct  
11 and understandable summary of how electronic devices of  
12 various types work and how the information is obtained,  
13 and, basically, concluding with the fact that it is new  
14 law in New Jersey that a warrant is required based on  
15 the state constitution, which grants more protection  
16 than the Fourth Amendment, notwithstanding their  
17 statute, which I am going to assume tracks the federal  
18 statute you cited, as does the Texas statute in Article  
19 18.21, Section 5, and that you're telling me that I  
20 should find, first and foremost, that the Texas  
21 Constitution offers more protection than the Fourth  
22 Amendment and that a warrant should be required, and,  
23 number two, in the alternative that their application  
24 wasn't sufficient under the statute to justify a court  
25 releasing this information.

1 Are those your two legal positions?

2 MR. MOORE: That's correct.

3 THE COURT: All right. I'm on the same  
4 page.

5 The State may respond.

6 MS. BURKS: Your Honor, am I understanding  
7 that the Defense is waiving their argument that the U.S.  
8 Constitution should require a warrant, as well?

9 MR. MOORE: No, I'm not waiving that.

10 THE COURT: Well, you're acknowledging that  
11 the Fifth Circuit has ruled against you on that.

12 MR. MOORE: That's correct.

13 THE COURT: If the Supreme Court changes  
14 their mind, you still assert it but understand that this  
15 court is probably bound by Fifth Circuit law, but you  
16 still want to make that objection in case the Supreme  
17 Court changes its mind?

18 MR. MOORE: Exactly.

19 THE COURT: I gotcha.

20 All right. With that understanding, you may  
21 proceed.

22 MS. BURKS: Thank you, Judge.

23 STATE'S CLOSING ARGUMENT

24 MS. BURKS: The first thing I would like to  
25 address is the issue of warrant requirement.

1           The Fifth Circuit did address this issue.  
2   Based upon a Southern District of Texas opinion, which  
3   they went through all the hearings that had occurred on  
4   Capitol Hill regarding the Electronic Communications  
5   Privacy Act, and they included very specific findings of  
6   the fact regarding how the technology has changed, how  
7   it works, how the very same arguments about how you can  
8   be pinpointed with your phone, and the Fifth Circuit did  
9   offer its opinion, which I will give to the Court and to  
10   the Defense, finding that the United States Constitution  
11   does not protect those records.

12           They found it based upon three different, I  
13   guess, portions of reasoning. First of all, that the  
14   person who's creating the record, using the phone,  
15   voluntarily contracted with a cell phone company and  
16   gave them information which they stored. This is a  
17   third party, not a governmental entity. And that when  
18   one uses a cell phone we know that we are creating  
19   records. And specifically in this case, Mr. Olivas, in  
20   his interview with the detective, and this is Pretrial  
21   Exhibit 2-A, page five, acknowledges when he says, the  
22   question, "And you know that we can track your phone in  
23   that general area? You know that? Are you aware of  
24   that," he says, Yes, sir." So he does know his phone is  
25   creating these records. So it is a voluntarily made

1 record.

2 Secondly, that these records were already in  
3 possession. The Government is not requiring AT&T or  
4 T-Mobile or any of these companies to create these  
5 records. They were already being created. And in this  
6 case, this is only historical information. And I would  
7 point out that the New Jersey court is addressing the  
8 issue, of they are calling up and actually getting  
9 real-time information. So it's a different issue.

10 And then thirdly, that they have the right  
11 to possess and access the information. And it's based  
12 on these three factors that the Fifth Circuit concludes  
13 that these are business records. And that is true in  
14 this case.

15 That law has been applied in Texas, the fact  
16 that this argument has been made already in Texas.  
17 There's two opinions that I found one. One of them is  
18 published and one of them is not. The published opinion  
19 is out of Houston. It is Barfield v. State, 2013 WL  
20 5861504.

21 THE COURT: Fourteenth. Fourteenth Court of  
22 Appeals, all right, go ahead.

23 MS. BURKS: I'm sorry. Yes, the 14th.

24 THE COURT: Okay.

25 MS. BURKS: And then the second one is out



1 of Dallas. It is 2013 WL 1819979, in which the Defense  
2 argued that there must be a warrant obtained in order to  
3 get historical cell site data. In both of those cases  
4 they followed the Fifth Circuit. There was no extra  
5 protection granted because of the Texas Constitution,  
6 and they rightly decide historical cell site data may be  
7 obtained by this court order, the same type of court  
8 order under 18.21, Section 5. That was obtained in this  
9 particular case, as well.

10 So, Your Honor, we would urge the Court to  
11 deny the Defendant's request that the Court find that  
12 the Texas Constitution provides more protection. And we  
13 ask that the Court follow the Fifth Circuit's  
14 interpretation of the United States Constitution in that  
15 it does not require a warrant to obtain historical cell  
16 site data.

17 As to the Defense's argument that these  
18 orders are insufficient, the standard that is required  
19 under 18.21 and under the Electronic Communications  
20 Privacy Act is that these orders contain -- or the  
21 applications for these orders contain reasonable --  
22 excuse me -- specific and articulable facts providing a  
23 reasonable belief that this material will be -- that it  
24 will be material to an ongoing investigation.

25 In these orders they clearly stated that a

1 victim was found in her burning apartment, that she was  
2 deceased, rescue efforts had commenced, they found her,  
3 she was deceased in her burning apartment -- in her  
4 apartment, and that she was found to appear to have  
5 several stab wounds -- this is indicative of a crime,  
6 Your Honor, obviously a murder -- and that their  
7 information that they gathered from her mother was that,  
8 you know, who could have done this, who was mad at her,  
9 well, she says, "Well, they've got a paternity suit  
10 going with the potential father of her child," and that  
11 that is the basis she believed of what had occurred to  
12 her daughter. And they also found that his phone  
13 number -- they went and talk to him, Mr. Olivas, this  
14 defendant, who was the other party in that SAPCR  
15 lawsuit, and that, first of all, the morning of March  
16 21st, 2011, they were unable to find him, which is the  
17 day after the victim was found in her apartment dead.  
18 They were unable to find him. Eventually they did find  
19 him and they interviewed him. And he gives them the  
20 story that he was going to go meet with her but didn't.  
21 And all of that is pretty much articulated in these --  
22 both of these orders.

23 THE COURT: And I do note that he'd actually  
24 been in contact with her on that evening.

25 MS. BURKS: And that it says he contacted

1 her, exactly, Your Honor.

2 THE COURT: It doesn't say he called her,  
3 but it does say contact.

4 MS. BURKS: Contact.

5 And so, Your Honor, the level of standard  
6 is, is not comparable to an arrest warrant. It's not  
7 comparable to a search warrant. This standard is a  
8 lower standard. And in this court in 2007, you actually  
9 decided, on the Martinez case, this very same standard.  
10 And it was a drug case and somebody was walking out with  
11 a bag that had something heavy in it and that's all that  
12 was there. That bag with something heavy in it was  
13 enough to say that's specific and articulable facts.  
14 This case far exceeds that standard. And so -- and that  
15 case was actually affirmed by the Fort Worth Court of  
16 Appeals, just, I can quote it for you, 236 S.W.3d 361,  
17 Martinez v. State, and I have copies of that if you want  
18 it, but you decided it at the time.

19 And so, Your Honor, the State would urge you  
20 to deny the Defense's motion based upon their statements  
21 that these are insufficient court orders, as well --  
22 applications. Thank you.

23 THE COURT: Thank you, Lori.

24 Under the theory "your motion, your burden"  
25 in the face of law, you wanting to change the law, do

1 you have any response? You want the last word? Are you  
2 satisfied with what you've said?

3 MR. MOORE: She correctly recited what the  
4 Fifth Circuit decided, Judge.

5 THE COURT: Okay. Thanks for pointing out  
6 this Court has apparently made wise and sound judicial  
7 decisions in the past on drug cases, and  
8 understanding --

9 MR. MOORE: I think you have, too, Judge.

10 THE COURT: Yeah. I appreciate that.

11 -- but the real issue here is probably much  
12 narrower and, quite frankly, it is a different issue.  
13 I'm going to address the sufficiency issue first. The  
14 standard is not that you believe the person whose phone  
15 records you want has committed a crime. The standard is  
16 it relevant to an ongoing investigation. And simply  
17 based upon the evidence before me, and I'm not going  
18 outside the four corners of the application, but just as  
19 a matter of common sense, an investigation is sometimes  
20 to convict and sometimes to clear people and to narrow  
21 the focus of who should be or is a suspect, when you  
22 have a dead body, limited information and you go to all  
23 sources and all leads. Pursuing a lead is relevant to  
24 an investigation, is material to an investigation. It's  
25 not the standards of we believe this person used this

1 phone to conduct drug transactions or to hire a hit man  
2 or to commit another crime. The bar that has to be  
3 crossed is this isn't some cop or other person wanting  
4 the records of his ex-wife to figure out who she's  
5 dating or whether he should have to pay child support.  
6 It's not the misuse of information by law enforcement  
7 authorities for personal or otherwise. It has to be  
8 relevant and material to an investigation. It doesn't  
9 have to be aimed at a target of an investigation. It  
10 might be to provide corroboration, that a witness's  
11 story is true or false, based upon did they make the  
12 calls to corroborate they did talk to someone at a  
13 particular day in time or to show that they were or were  
14 not in a different area, to provide an alibi or to rebut  
15 an alibi or just a story from a person who's absolutely  
16 not a suspect who's trying to help or hurt one side or  
17 the other in a criminal dispute.

18 So based upon that standard, the Court finds  
19 as a matter of fact, concludes as a matter of law that  
20 the language articulated in each of these applications,  
21 which appear to be identical, is legally sufficient to  
22 set out that the phone number and its use, reading a  
23 totality of it -- and I concede talked on the phone  
24 would be better -- but his location, having discussed  
25 arrangements to meet but not meeting, locating this

1 person is a legitimate need or their whereabouts at the  
2 time of an alleged offense is a legitimate purpose of a  
3 criminal investigation, whether that information were to  
4 help convict or help clear that person.

5 So your grounds of sufficiency is overruled  
6 based on the lower and different standard for obtaining  
7 information versus to arrest a person suspected of a  
8 crime. It's not a probable cause standard and I will  
9 not raise it to that level on that sufficiency basis.

10 On a separate and distinct issue of is a  
11 warrant required to obtain this information, that the  
12 application process is constitutionally infirm because  
13 it infringes upon a citizen in Texas, in particular,  
14 their reasonable expectation of privacy in the  
15 electronic age, I will say with all the publicity, all  
16 the issues concerning the NSAA, the war on terror, who's  
17 spying on who, plays what video games, it's a legitimate  
18 public policy concern that ought to be raised and looked  
19 at in a free society, by lawyers on either side of the  
20 courtroom, by citizens at large.

21 What can be done with a phone, the New  
22 Jersey court correctly addressed this is the real world,  
23 and Lori's point is totally accurate, I choose to sign  
24 up with this company, the Fifth Circuit recognizes that,  
25 I enter a contract and in all the fine print no one ever

1 reads probably said we're keeping all this stuff and  
2 we'll cooperate with the Government and we'll pay taxes,  
3 and we sign that like we do on a car loan or anything  
4 else. But the reality is, you have to have a car to get  
5 to work in Texas and most people have to have a cell  
6 phone to function in their job and in their life. So  
7 the New Jersey court says it's not really a voluntarily  
8 third-party transaction, because the reality in today's  
9 world is you can't survive without it, and that is a  
10 legitimate observation and maybe a legitimate concern on  
11 the part of all citizens as our technology evolves, and  
12 as the data from our credit cards might be stolen from  
13 some former Soviet Republic when we stop at Target,  
14 those are concerns that need to be addressed. But in  
15 this specific point, this specific issue, the nature of  
16 what's available, the knowledge of what's available --  
17 off the record.

18 (Discussion off the record)

19 THE COURT: As a matter of fact and law -- I  
20 will not override the Fifth Circuit on what protections  
21 are afforded by the U.S. Constitution. So as a matter  
22 of fact and law, I find that the state statutory scheme  
23 in Article 18.21, Section 5, as applied in this case, is  
24 not violative of the United States Constitution.

25 Based upon the rulings of the Court of

1 Appeals, I do not find as a matter of fact and law that  
2 this process is violative of Article 1, Section 9 of the  
3 state constitution, and understand the Defense  
4 strenuously believes otherwise and this adverse ruling  
5 preserves this issue for the Court of Criminal Appeals  
6 to ultimately resolve.

7 Third, based upon the interview, the six  
8 hours plus of which I observed, and the written consent  
9 to search, I am not so sure he didn't waive any privacy  
10 interests based upon his statements and the logical  
11 implication of those statements when it was described  
12 what's done with cell phones and other information. So  
13 even if Article 1, Section 9 of the state constitution  
14 does give greater protection, based on the specific  
15 facts of this case, it is my opinion, in the totality of  
16 his interviews and statements "I have nothing to hide"  
17 "get what you want" "we can do this" "that will be  
18 great" "the sooner the better" -- that's paraphrased --  
19 your client from the get-go professed his innocence and  
20 uninvolved in the death of the paramour or the child  
21 and repeatedly offered any assistance and opportunity to  
22 help solve this crime and bring the real killer to  
23 justice, and he signed it in writing and he verbally  
24 repeated throughout his interviews. And I believe even  
25 if Article 1, Section 9 turns out in hindsight,



1 notwithstanding the Court of Appeals decisions, that the  
2 Court of Criminal Appeals determines the Texas  
3 Constitution gives better protection, I think verbally  
4 and in writing he waived that right to privacy in what  
5 appeared to be a sincere and clear effort, if to either  
6 cooperate or give the impression that he wanted to,  
7 that's what trials are for.

8 MR. MOORE: Can I interrupt you?

9 THE COURT: Yeah.

10 MR. MOORE: Does that mean, and in your  
11 ruling, that because he said, "I'll help in any way I  
12 can," this is effectively a consent to "go get my cell  
13 phone records"?

14 THE COURT: No. My position, Tim, is not  
15 any one thing did that. The consent to search, to  
16 search the phone, they told him they're trying to get  
17 the numbers, the information they told him, the  
18 information that's available through the phone, and in  
19 the context of the whole conversation I believe that's  
20 the common-sense interpretation, not one limited item.

21 Yeah, can you look at my phone, can I do  
22 this, fine, but to go through the process of the consent  
23 to search in an ongoing interview where information was  
24 explained on the type of information that's available, I  
25 think in the totality context of this case that that

1 very well could be a waiver, not one thing, but hours of  
2 different comments, written waivers, the whole big  
3 picture, a one-time "can we do this?"

4 "Yes. Fine," no conversation, no  
5 explanation, I would not reach that conclusion.

6 And in all fairness, that's just an  
7 appellate attorney assuming arguendo that the state  
8 constitution does give greater protection. In this case  
9 that protection appears to have been waived, but that's  
10 not a universal ruling.

11 My preliminary ruling is motion denied.  
12 Fourth Amendment does not protect against this -- well,  
13 back up. Rewind.

14 Motion denied. Sufficiency of the  
15 applications for the relevance or materiality to an  
16 investigation challenge is denied based on fact and law  
17 recited. Number two, challenge to the application  
18 infirm or not in the application and the order that was  
19 a result thereof in each of these two instances, denied  
20 on the basis that it violates the Fourth Amendment of  
21 U.S. Constitution. Item three, same reasoning, same  
22 issues, motion to suppress denied as to each application  
23 and the data obtained therefrom, that it violates  
24 Article 1, Section 10 of the U.S. Constitution. And  
25 so -- I mean Article 1, Section 9 of the Texas

1 Constitution. And item four, even arguendo if wrong on  
2 items two and three, or one, the consent to search and  
3 the verbal acknowledgments throughout the interview seem  
4 to imply, clearly, reasonably imply, a waiver and an  
5 agreement to cooperate under the specific facts of this  
6 case.

7 If I'm wrong on one through three, four as a  
8 matter of fact and law -- my impression was a person who  
9 is sincerely or manipulatively trying to get to the  
10 bottom of what happened to my child to get them self  
11 cleared and to get on with their lives so the real  
12 murderer can be caught. And in all fairness, I have  
13 heard no facts. The umpire doesn't take sides. And  
14 either a deception or a sincere plea of innocence could  
15 be true, and that's what the jury decides.

16 But based upon his black-and-white, in the  
17 reading of the transcript or his face, his expressions  
18 in the black and white of the consent to search, there  
19 was a person there saying, "Whatever I need to do to  
20 solve who killed my son..." and in the context of this  
21 case, phone records, locations, what we can track, he  
22 didn't withdraw the search of the phone. It was  
23 explained about "we can find out where you were."

24 "That's fine." There wasn't any "oops, I  
25 shouldn't -- I need to back off her." "I need to lawyer

1 up." "I need to do anything else." It was nonstop  
2 "what can I do to help," and I believe waiver is  
3 implied, clearly. I don't think we'll get to there. I  
4 don't think that will matter. I don't think we'll get  
5 there, but if the Court of Criminal Appeals says the  
6 state constitution says warrant, then that consent issue  
7 is something that might come up, and those are my  
8 factual observations related to that.

9 MR. MOORE: Thank you.

10 THE COURT: So any evidence admitted as a  
11 result of either of the two orders that are attached to  
12 the Defendant's motion to suppress, which is the subject  
13 of this hearing, be they who called who, be they cell  
14 tower locations, the motion to suppress is denied.

15 Do you want a running objection to the  
16 admissibility of any of that information -- admissibility of  
17 any of that information?

18 MR. MOORE: Yes, we do.

19 THE COURT: That will be granted. And if in  
20 doubt, when it's offered at trial, "I renew my pretrial  
21 objections."

22 "Reconsidered in light of the record," and  
23 either, "sustained," or "overruled," depending on what  
24 the record is at the time they're offered.

25 MR. MOORE: So if I say, "Judge," when these

1 records are offered, "we object based on our previous  
2 hearing," you'll know what I'm talking about?

3 THE COURT: "Based on the pretrial  
4 hearings," yes, I will know we are talking about this  
5 specific motion.

6 The State concedes that, as well; is that  
7 correct?

8 MR. ROUSSEAU: Yes, sir.

9 THE COURT: All right. Anything else on  
10 that issue?

11 MR. MOORE: No, sir.

12 MR. ROUSSEAU: No, sir.

13 THE COURT: Off the record.

14 (Discussion off the record)

15 THE COURT: On the record.

16 There have been numerous other motions and  
17 notices filed in these causes throughout the pendency of  
18 this case, or these cases, technically. The parties  
19 have continually advised me that they continue to share  
20 information, to communicate. I think that was made  
21 evident earlier in the week based upon the revelation of  
22 the crime scene evidence that hadn't been analyzed due  
23 to the retirement of one of the trace analysts at the  
24 Medical Examiner's Office. And I've appreciated that.  
25 It's the Tarrant County way. I think it's, in the

1 justice system, the way it needs to work.

2           There are numerous filings, answers and  
3 notices that have actually been filed in the records of  
4 the Court's cause in response to either formal or  
5 informal requests. I know the State has maintained an  
6 open-file policy independent of the Michael Morton Act  
7 and the Defense has access to electronic documents  
8 contained in the State's file, including, but not  
9 limited to, police reports, statements and other  
10 matters. But if there's anything either side wishes to  
11 a make record of for purposes of discovery or otherwise,  
12 or motions that haven't already been directly addressed,  
13 this is your opportunity to do so, and if I need to make  
14 formal rulings, I will. If you simply need to put  
15 notice in the record of what's going on, that's fine.

16           Who wants to go first?

17           MS. KEENE: Judge, we filed a number of  
18 pretrial motions last year, and I know the State has  
19 copies of those. We've agreed on most of those. And it  
20 might be easier, since they're my motions, for the State  
21 to go through and say if they agree or if there's issues  
22 or where we are on those, since it would be them  
23 agreeing or not agreeing.

24           THE COURT: That will be fine.

25           Kevin, are you agreeable with that

1 procedure?

2 MR. ROUSSEAU: Yes, Your Honor.

3 THE COURT: All right. Then if you'll  
4 identify the specific motion and the file-mark date and,  
5 that way, I'll know I have a copy of it and know what  
6 you're talking about.

7 MR. ROUSSEAU: Okay. I'm assuming, Your  
8 Honor, that the motions that I have are in the same  
9 order as they appear in the file, but, unfortunately,  
10 the copy I have is not file-marked so --

11 THE COURT: Okay. Well, then just call out  
12 the name and then I'll find it and I'll give you a  
13 thumbs-up when I'm looking at it.

14 MR. ROUSSEAU: Okay. It is in the old cause  
15 number, 1298688D, and it's Motion for Production of  
16 Evidence Favorable to the Accused. And we have -- I  
17 have no objection to one, no objection to two, no  
18 objection to three, except about 3(D), it asks for the  
19 names and addresses of all the persons interviewed by  
20 the State in connection with this case, of who the State  
21 does not intend to call as witnesses in this case. To  
22 the extent that that gets into my work product, I  
23 object. However, I have complied and will continue to  
24 comply if any people meeting that description supply us  
25 with anything that's Brady or related to Brady in its

1 progeny in any way, I will give that up as I have.

2 That's the only objection I have to anything.

3 MS. KEENE: And, Judge, we're not entitled  
4 to require them to give us the names of all the  
5 witnesses under this present statute, so I understand  
6 that and agree with his objection.

7 THE COURT: Okay.

8 MS. KEENE: And obviously Brady material...

9 THE COURT: I mean, Brady overrides work  
10 product, but he's acknowledged that.

11 MS. KEENE: Correct.

12 THE COURT: Off the record.

13 (Discussion off the record)

14 THE COURT: All right. Then as to  
15 Defendant's Motion for Production of Evidence Favorable  
16 to the Accused, and it says filed November 4th, 2013,  
17 the motion is granted as to -- within the limitations  
18 requested by the State concerning work product that  
19 wasn't Brady.

20 And you accept that ruling?

21 MS. KEENE: We do, Judge.

22 THE COURT: All right. Next.

23 MR. ROUSSEAU: Motion for Discovery. And,  
24 Your Honor, several times you may hear -- I'm going to  
25 refer to "Brady information" or "Brady materials". I



1 want it understood that it's covering everything, Brady  
2 in its progeny, basically impeaching evidence --

3 THE COURT: Mitigation.

4 MR. ROUSSEAU: -- exculpatory evidence, all  
5 of the above.

6 THE COURT: Right.

7 MR. ROUSSEAU: Motion for Discovery No. 1,  
8 it's exactly the same objection I had previously. I'll  
9 give up anything if it's Brady related, but other than  
10 that, I think it's probably -- as it relates to the  
11 Office of the Tarrant County District Attorney, I  
12 believe it's a violation of work product, but everything  
13 else, they already have an opportunity to give that up.

14 THE COURT: Any objection to that?

15 MS. KEENE: No objection to that, Judge.

16 THE COURT: All right. Granted with that  
17 understanding.

18 MR. ROUSSEAU: No objection to two. No  
19 objection to three.

20 THE COURT: Granted to both.

21 MR. ROUSSEAU: As to four, name, address and  
22 telephone number of any person the State knows to have  
23 been present at the time and place of the alleged  
24 offense, I have provided all of that, with the exception  
25 of the addresses and telephone numbers to the extent

1     that I have them, and I will continue to cooperate with  
2     Ms. Keene and Mr. Moore. If they need any help locating  
3     somebody, if I can help them, I will do that.

4             THE COURT: All right. Then granted within  
5     those parameters.

6             MR. ROUSSEAU: Number five, no objection.

7             THE COURT: Granted.

8             MR. ROUSSEAU: Number six, same objection as  
9     previously. I have no objection except as it relates to  
10    work product of the District Attorney; that is, if I  
11    personally go out and talk to somebody, I'm not going to  
12    reduce that to writing. If I have a written statement  
13    from them or a recorded statement, I'll provide that,  
14    but I'm not going to produce --

15            THE COURT: Well, you look --

16            MR. ROUSSEAU: -- create a document.

17            THE COURT: -- at the last sentence, the end  
18    of the paragraph...

19            MR. ROUSSEAU: Oh, absolutely, Your Honor.  
20    I apologize. Since this is Brady related, they'll have  
21    that.

22            THE COURT: All right. Then six is granted.

23            MR. ROUSSEAU: We've provided criminal  
24    arrest and conviction records already of everyone I  
25    believe that's been requested.

1 Is that correct, Joetta?

2 MS. KEENE: Yes, but I don't know if it's  
3 everyone, but we asked for all the witnesses and they  
4 provided us with about an inch thick of what appears to  
5 be all --

6 THE COURT: Anyone they anticipate  
7 reasonably being called.

8 MS. KEENE: Yeah, they just said they have,  
9 and we have that.

10 MR. ROUSSEAU: With the exception of peace  
11 officers.

12 MS. KEENE: Correct.

13 THE COURT: And, in all fairness, I  
14 authorized that to comply with NCIC/TCIC. I verbally  
15 authorized that a long time ago.

16 MS. KEENE: Correct.

17 THE COURT: And you understand, since we  
18 have a record, that at the conclusion of trial you need  
19 to return that information to the State unless it's  
20 under seal in evidence with the court reporter.

21 MS. KEENE: I understand.

22 THE COURT: I know that, but I'm just  
23 letting the FBI and Department of Public Safety know  
24 that, as well.

25 All right. You may continue.

1 MR. ROUSSEAU: No objection to eight, nine  
2 or ten.

3 THE COURT: Those will be granted, as was  
4 seven, previously.

5 MR. ROUSSEAU: Yes, sir. No objection to  
6 number 11 except as relates to work product of the  
7 District Attorney's Office.

8 THE COURT: Eleven is granted as to -- if  
9 work product is something you're going to offer, like  
10 you have someone draw you a diagram or you draw a  
11 diagram to question a witness, if that's something to be  
12 in evidence and offered, then obviously it switches to a  
13 drawing or a chart that's being used for trial, but if  
14 it's just for internal use only, not granted to that.

15 MS. KEENE: I understand that, Judge. I  
16 wasn't asking for their work product, in any of these --

17 THE COURT: No, I know.

18 MS. KEENE: -- if that was interpreted. I  
19 don't want their work product.

20 THE COURT: In all fairness, some of the  
21 best work product sometimes turns into the best exhibits  
22 because --

23 MS. KEENE: It does.

24 THE COURT: -- when you --

25 MS. KEENE: It does.

1 THE COURT: -- interview the witness, you do  
2 a better job of it than maybe the officer who talked to  
3 them for five minutes when you talked to them for 30.

4 So with that understanding, it's granted.

5 MR. ROUSSEAU: No objections to 12, 13 or  
6 14.

7 THE COURT: They'll each be granted.

8 MR. ROUSSEAU: Fifteen I believe is not  
9 applicable -- well, co-defendants...

10 THE COURT: Well, there aren't any  
11 co-defendants and the witnesses are covered by a prior  
12 section.

13 MS. KEENE: Correct. We'll waive 15.

14 THE COURT: Fifteen is waived.

15 MR. ROUSSEAU: Number 16, no objection.

16 THE COURT: It's granted.

17 MR. ROUSSEAU: And that's the end of that  
18 motion.

19 Next, Motion for Disclosure of Expert  
20 Witnesses, they're entitled to that and obviously I have  
21 no objection.

22 THE COURT: That will be granted.

23 MR. ROUSSEAU: And I have an identical, at  
24 least -- I have the same request filed, also, Your  
25 Honor.

1 THE COURT: Then let's just address that at  
2 this time.

3 MS. KEENE: We'll comply. We don't have any  
4 at this point to disclose, but when we decide if we do  
5 or don't -- once we decide we do, then we will give  
6 those to the State.

7 THE COURT: All right. And I will just tell  
8 you this. Once you get your new trial date upon  
9 conclusion of the DNA evidence, or the other testing,  
10 whenever you get your trial date, you'll disclose it to  
11 them 30 days before the trial date.

12 MS. KEENE: That's fine.

13 THE COURT: Okay. Or, let me say, no later  
14 than 30 days before. You can disclose whenever you see  
15 fit, if you're sure you're going to call someone.

16 MS. KEENE: Correct.

17 THE COURT: And that's testifying experts.

18 MS. KEENE: Correct.

19 THE COURT: Or they don't get to testify if  
20 you don't, but consulting experts, it's not applicable.

21 And you may continue, Mr. Rousseau.

22 MR. ROUSSEAU: Yes, sir.

23 THE COURT: Next.

24 MR. ROUSSEAU: Motion in limine is the next  
25 one, Defendant's statements. I believe you ruled on

1 these yesterday, Your Honor.

2 THE COURT: Hold on two seconds.

3 MS. KEENE: Judge, I had one, Motion to  
4 Conduct Voir Dire Examination of State's Expert  
5 Witnesses. Should be right after Expert Disclosure.

6 MR. ROUSSEAU: Yeah. Yes, I apologize.

7 THE COURT: That's okay.

8 MR. ROUSSEAU: I skipped over that one.

9 THE COURT: Well, in all fairness, mine  
10 aren't in the order you've been calling them. I'm  
11 having to surf so -- they're jumbled, so it doesn't  
12 matter.

13 MR. ROUSSEAU: I believe she's entitled to  
14 it without an order.

15 THE COURT: All right. Defendant's 39.14  
16 motion is granted. You want 705 hearings or at least...

17 MS. KEENE: At least ask if we do, I guess,  
18 Judge.

19 THE COURT: Yeah, I mean -- off the record.  
20 (Discussion off the record)

21 THE COURT: On the record.

22 All right. As far as the 705 hearing, as we  
23 approach the trial date, the State will let the Defense  
24 know which of their many potential experts they're  
25 likely to call in their case-in-chief and we'll have an

1 organizational heads-up on who probably will need a 705  
2 hearing or not. I'll let y'all informally discuss it.  
3 But if in doubt, I just don't want the jury  
4 sucker-punched with not being able to take breaks when  
5 we can schedule 705 hearings around it to keep it  
6 convenient for them.

7 MR. ROUSSEAU: As long as -- I would request  
8 that apply to both sides.

9 THE COURT: Yes. That would -- you reserve  
10 the right to request a 705 hearing, as well.

11 MR. ROUSSEAU: Thank you.

12 THE COURT: So anyone that's going to call  
13 an expert or elicit potentially what under the law we  
14 would call expert testimony, even if they would  
15 otherwise be a lay witness, advise the Court and  
16 opposing counsel there could be a legal right to request  
17 a 705 hearing and we have it addressed.

18 MS. KEENE: That's correct.

19 THE COURT: All right.

20 MR. ROUSSEAU: Motion in limine?

21 MS. KEENE: Judge, our first motion in  
22 limine is Defendant's statements. You ruled on those  
23 yesterday. I would not include those in the motion in  
24 limine at this time based on the Court's rulings, but if  
25 there were any other statements made by Thomas Olivas



1 that we didn't cover yesterday, I guess I would still  
2 ask for that to be within the motion in limine.

3 THE COURT: Not be elicited unless...

4 MS. KEENE: Without having a hearing. I  
5 think we covered them all yesterday but --

6 MR. ROUSSEAU: Anything I can think of right  
7 now, Your Honor, is going to be statements he's made to  
8 non-law enforcement personnel.

9 THE COURT: Here's my position. Anything  
10 that under the most liberal or conservative  
11 interpretation might evoke 38.22 issues, if we haven't  
12 already addressed it, bring it up outside the jury's  
13 presence. If it's to third parties who are not obvious  
14 direct agents of the State and bound by Miranda-type  
15 considerations, then the limine does not apply to  
16 conversations with other individuals.

17 MS. KEENE: And it specifically says law  
18 enforcement.

19 THE COURT: Yeah, I see that.

20 MR. ROUSSEAU: Okay.

21 THE COURT: And if they are an agent of law  
22 enforcement, if the cop sent someone to go --

23 MS. KEENE: Exactly.

24 THE COURT: Yeah, so I -- I'm just making  
25 that clear.

1 MS. KEENE: I like that, Judge, thank you.

2 THE COURT: All right. Motion in Limine,  
3 Convictions and Extraneous Bad Acts.

4 MS. KEENE: They've given us -- and I think  
5 the next motion, or incoming, is notice of extraneous  
6 offenses. They've given a list of I'd say 20ish --

7 THE COURT: It's filed.

8 MS. KEENE: -- extraneous offenses. I would  
9 say those would be the ones I'm talking about. I know  
10 of no others, and they obviously have not given me  
11 notice of any others. So it would be really any of  
12 those, that conduct, I would like a motion in limine on  
13 prior to it being offered into evidence.

14 THE COURT: For purposes of the  
15 guilt/innocence phase, if it's not part of the same  
16 transaction/contextual evidence of an alleged murder and  
17 arson, then it's granted.

18 MS. KEENE: Oh, yeah, yeah, yeah,  
19 absolutely.

20 THE COURT: If there were to be a punishment  
21 phase where there would be sentencing options for the  
22 jury --

23 MS. KEENE: Not.

24 THE COURT: -- then 37.07 issues, the limine  
25 wouldn't apply.

1 MS. KEENE: Absolutely.

2 THE COURT: They could follow the punishment  
3 rules without previewing their punishment case for the  
4 Court.

5 MS. KEENE: I agree with that, Judge.

6 THE COURT: All right. Then within that  
7 context, the motion is granted.

8 MS. KEENE: And then, Judge, I can actually  
9 address the next one. We addressed the two motions to  
10 suppress. So the final motion we have is Motion to  
11 Inspect, Examine and Test Physical Evidence.

12 The prosecutors -- both prosecutors and then  
13 the Defense team have already met with Detective  
14 Stewart, the crime scene officers. We've already looked  
15 at all of the evidence. We did that prior to -- I filed  
16 the motion, but we did it prior to -- I think it was  
17 actually in December. At that point we did not have any  
18 desire to test any evidence, based on what we saw, based  
19 on everything that we've seen in the reports. Of  
20 course, I don't know what's about to happen with the  
21 evidence that's being taken to test. So, basically,  
22 this has been complied with. We don't need any rulings  
23 on this except I don't want to waive it because I don't  
24 know what's going to happen with the new evidence that's  
25 being tested.

1 THE COURT: Well, let me just say this. All  
2 evidence that at this time you're aware will be offered,  
3 that any testing has been done, you received the  
4 reports, you have information, you don't need anything  
5 new, and based upon the stuff that Pat Eddings did not  
6 look at that we do not know if it's simply hair or hair  
7 with DNA potential, based on the outcome of that  
8 testing, you may or may not want to have independent  
9 testing.

10 MS. KEENE: Exactly. Perfectly stated.

11 THE COURT: All right. And that's the only  
12 thing we know of that hasn't been addressed informally  
13 and professionally by the parties throughout their  
14 investigation.

15 MS. KEENE: That's all we know about, Judge.

16 THE COURT: All right. Then the motion has  
17 been complied with voluntarily up to date and you can  
18 inspect and review the other evidence when it's back  
19 just as you've done everything else, and if you want  
20 something else, I will assume -- if there's no motion  
21 requesting funds to test or retest, I will assume you're  
22 satisfied.

23 MS. KEENE: We are, Judge.

24 THE COURT: I mean with the new stuff, as  
25 well.

1 MS. KEENE: Yes, yes, yes, yes.

2 THE COURT: All right. If you don't file  
3 anything new for a retest or additional tests, then I  
4 will assume you're satisfied with what you have as you  
5 are to date.

6 MS. KEENE: Yes, sir.

7 THE COURT: All right. Any other motions  
8 the Defense needs a record of at this time?

9 MS. KEENE: None, Judge.

10 THE COURT: Any motions or anything the  
11 State needs a record of at this time, since we've  
12 already covered your notice of expert issue?

13 MR. ROUSSEAU: I don't think I have anything  
14 else, Your Honor. I may have a motion in limine as we  
15 get to closer to trial, but nothing that can't be  
16 handled right then.

17 THE COURT: All right. Off the record.

18 (Discussion off the record)

19 THE COURT: Then we'll be in recess pending  
20 an update on the trace evidence analysis or potential  
21 for further analysis, which I hope we will get sooner  
22 instead of later. And we're in recess.

23 (Pretrial Hearing concluded at 11:15 a.m.)  
24  
25

## 1 COURT REPORTER'S CERTIFICATE

2 THE STATE OF TEXAS )

3 COUNTY OF TARRANT )

4 I, Karen B. Martinez, Official Court Reporter in and  
5 for the 372nd District Court of Tarrant County, State of  
6 Texas, do hereby certify that the above and foregoing  
7 contains a true and correct transcription of all  
8 portions of evidence and other proceedings requested in  
9 writing by counsel for the parties to be included in  
10 this volume of the Reporter's Record, in the  
11 above-styled and numbered cause, all of which occurred  
12 in open court or in chambers and were reported by me.

13 I further certify that this Reporter's Record of the  
14 proceedings truly and correctly reflects the exhibits,  
15 if any, admitted by the respective parties.

16 I further certify that the total cost for the  
17 preparation of this Reporter's Record **is located at the**  
18 **end of Volume 21.**

19 WITNESS MY OFFICIAL HAND this the 30th day of March,  
20 2015.

21 /s/ Karen B. Martinez

22 Karen B. Martinez, Texas CSR 6735  
23 Expiration Date: 12/31/2015  
24 Official Court Reporter  
25 372nd District Court  
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